Human Rights Consortium
SCHOOL of ADVANCED STUDY
UNIVERSITY OF LONDON

Refugee Law Initiative

On the Borders of Refuge Protection: The Impact of Human Rights Law on Refugee Law – Comparative Practice and Theory

Final Conference Report

13 and 14 November 2013

Institute of Advanced Legal Studies, London

HARVARD LAW SCHOOL
Harvard Immigration and Refugee Clinic

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Acknowledgements

The convenors are very grateful to Jules Winterton and Belinda Crothers of the Institute of Advanced Legal Studies (SAS, UK) for their kind hosting of this conference. We are also extremely grateful to the following partner organisations for their generous support of the conference: Centre for Refugee Studies (York, Canada); Harvard Immigration and Refugee Clinic (USA); International Association of Refugee Law Judges; International Refugee Law Research Programme (Melbourne, UK); Refugee Studies Centre (Oxford, UK); and United Nations High Commissioner for Refugees (Bureau for the Americas). We would also like to express our appreciation to Lord Dyson MR for his opening address at the event.

Our special thanks are extended to Mehrunnisa Yusuf and Chloe Pieters at the Refugee Law Initiative (SAS, UK) for their invaluable support in organizing the event, to Serena Gonfiantini for note-taking and to Stefania Barichello for her assistance on the day. We are especially grateful to Steering Committee of the Human Rights Consortium of the School of Advanced Study, University of London, for their generous financial support.

Finally, we wish to say thank you also to all of the participants, and particularly the speakers, for their informed and spirited contributions.

Introduction

This report summarises the proceedings at the international conference 'On the Borders of Refuge Protection: The Impact of Human Rights Law on Refugee Law – Comparative Practice and Theory' hosted by the Institute of Advanced Legal Studies, School of Advanced Study of the University of London, on 13-14 November 2013.

The conference was organized by the Refugee Law Initiative, School of Advanced Study of the University of London, in partnership with the Centre for Refugee Studies (York, Canada), Harvard Immigration and Refugee Clinic (USA), International Association of Refugee Law Judges, International Refugee Law Research Programme (Melbourne, UK), Refugee Studies Centre (Oxford, UK) and United Nations High Commissioner for Refugees (Bureau for the Americas). The event was convened by Bruce Burson, New Zealand Immigration and Protection Tribunal, and David James Cantor, Refugee Law Initiative.

Overall, the conference explored how international human rights law (IHRL) is shaping the protection of refugees worldwide. A high-level event, it brought together more than twenty leading international specialists in the refugee protection and IHRL - including experts from UNHCR - to take stock of transnational developments in law and practice over the past twenty years, and to cultivate new approaches to the topic.

The five thematic panels of the conference sought to move beyond abstract approaches to IHRL and refugee law to assessing legal interaction between the two fields in practice. The first day was dedicated to wide-ranging comparative perspectives on how IHRL is impacting on refugee law in national settings across the world. The second half-day explored the novel ways in which the borders of refugee protection are being shaped by cross-cutting special themes in HRL and the future challenges that this poses.

Opening Comments

A welcome address was given by **David James Cantor** in his role as co-convenor of the conference and Director of the Refugee Law Initiative. He posed the broad conference question of the role of human rights in refugee law: is human rights law on the 'borders' of refugee protection or is its role more fundamental?

The opening address was then given by the invited guest of honour **Lord Dyson**, who emphasised the humanitarian roots of the Refugee Convention as a tool grounded in the protection of human rights. He cited cases such as *RT (Zimbabwe)* and *HJ (Iran)* decided by the Supreme Court as a good illustration of how judges in the United Kingdom are trying to use both international and European human rights law to interpret and apply refugee law. He also drew attention to a growing internationalisation of refugee law, where judges from one country look to the jurisprudence of other countries for inspiration, even between common and civil law countries. He concluded by wishing all of the participants a good conference.

SECTION I – COMPARATIVE PRACTICE ACROSS THE GLOBE

Panel I: Common Law Jurisdictions

The first panel – chaired by **Steve Meili** – set the scene by comparing the distinctive ways in which human rights laws and concepts are integrated into refugee protection practice by a range of leading common law jurisdictions outside Europe.

James Simeon explained how the refugee legislation in Canada (2001 Immigration and Refugee Protection Act) incorporated reference to both domestic and international human rights standards through Section 3(3). Moreover, Section 95 IRPA provides that 'refugee protection' is to be conferred both on Convention refugees and on other 'persons in need of protection', the latter category being based expressly on human rights protection needs. He then traced the Canadian jurisprudence to show a heavy reliance by Canadian courts on domestic human rights law, but also an increasing reliance on international human rights law in determining refugee issues. This began with the decision in *Singh*, which drew on human rights due process standards as the impetus to establish a new refugee status determination system in Canada, through to *Pushpanathan*, where the Canadian Supreme Court interpreted the Article 1F(c) exclusion clause by reference to the concept of human rights.

In a joint presentation on Australia, **Susan Kneebone** drew contextual attention to the State-centred nature of its dated refugee legislation (1958 Migration Act). In this, and in subsequent regulations, the 'obligations under the Refugees Convention' in Section 36(2)(a) are read as obligations to other States rather than to individuals and the executive is afforded a broad and excessive discretion in deciding whether to recognise refugees. She then drew attention to the human rights challenges generated by the creation of a separate processing system for 'offshore arrivals' of refugees. **Linda Kirk** then offered reflections on the Australian refugee jurisprudence. She noted that whilst the High Court had, since its decision in *Chan Yee Kin* in 1989, defined 'persecution' in terms of human rights violations, this liberal interpretation had been reversed by a new statutory definition of the term in 2001 that did not refer to human rights standards. She showed that Australia's obligations under international human rights law were also reflected in the 2011 incorporation and codification of 'complementary' protection.

Deborah Anker explained the general resistance on the part of the USA to incorporating international human rights law and its scant sense of commonality with other States in this regard. The 1980 Refugee Act makes no reference to human rights law. Nonetheless, even

though references to human rights may be absent from decisions, there are good reasons to think that it forms part of the background to the assessment of cases. This could be seen for 'particular social group' in the idea of 'immutable' and 'fundamental' characteristics. Also, the definition of 'persecution' as 'suffering or harm… in a manner condemned by civilized governments' has led to a lot of decisions that may not expressly refer to human rights standards but which use very similar language, e.g. 'deprivation of liberty, food, housing, employment or other essentials of life' as in *Matter of T-Z-*.

Bruce Burson observed that the New Zealand refugee protection system is protection- rather than immigration-focused. He argued that the fact that the elements of the refugee concept are not defined in statute (e.g. 2009 Immigration Act) has led decision-makers to engage in a transnational conversation via the language of human rights. From the early 1990s onwards, New Zealand decision-makers have interpreted the refugee concept by reference to a range United Nations human rights treaties and the views of their treaty bodies, an approach fully articulated in *Refugee Appeal No 74665*. He argued that one of the key shifts in jurisprudence since then has been the system's abandoning of the language of hierarchy between different 'levels' of rights as a mere distraction, as in *Refugee Appeal No 75221*. The key challenge at present lies in articulating voluntary but protected interests through the analysis of core-peripheral entitlements of specific human rights.

The presentations generated questions about the different methodologies that might be applied to elucidate the relationship between refugee protection and human rights law: depending on the level at which analysis is conducted different answers to this question might result. Some raised complex scenarios in which a human rights approach might be more or less attractive, including where a large number of claims are presented or where those seeking asylum are fleeing situations of generalised violence. On a related point, there was also discussion about whether these States applied concepts such as the margin of appreciation in their use of human rights law as a means of determining refugee claims from often far-away countries.

Panel II: European Jurisdictions

The second panel – chaired by **Violeta Moreno-Lax** – moved to consider how human rights standards impact upon refugee concepts in the European context, especially in light of the influence of European asylum and human rights law. The panel gathered three contributions

on national practice in countries that are influential for legal development and a fourth contribution on the jurisprudence of the two main international courts in Europe.

Raza Husain began by outlining the contributions – both positive and negative - made by the jurisprudence of the United Kingdom (UK) to consideration of the relevance of human rights law for refugee law. On the latter, he addressed the risks of the *Horvath* approach in shifting the decision-maker's attention away from individual persecution towards the failure of State protection, and also the use of human rights law to narrow the concept of persecution in *Sepet and Bulbul*. On the former, he emphasised the positive use of human rights standards to illuminate the Convention reasons in cases such as *HJ Iran* and *RT Zimbabwe*. He pointed out that the factual situations in these cases now enjoy a broader scope of protection under refugee law than under the non-*refoulement* principles developed by the European Court of Human Rights (ECtHR) in relation to the rights to privacy and freedom of religion.

Roger Errera offered comments on the tendencies evident in France. He spoke to the wider context first, arguing that the French jurisprudence shows considerable internationalisation as compared with only a generation or two ago. This includes not only human rights instruments but also humanitarian law, international criminal law and even United Nations and non-governmental organisation documents. Secondly, he identified the 'beginning of the end' of the tendency to treat the different sources of international law separately. Instead, even though the basic distinctions between such sources are maintained, French courts are beginning to integrate them all into wider refugee law on a similar footing.

Roland Bank asked whether the use of human rights in German refugee law jurisprudence is 'cutting edge' or rather has a 'chilling effect'. He argued that the entry into force of the European Union (EU) Qualification Directive required German courts to refer to human rights in order to resolve certain interpretative challenges. Yet traditional restrictive interpretations continue to inhere. For example, they still play an important role in the case-law on persecution resulting from manifestation of religion, even though this now requires revised conceptual approaches in light of recent CJEU jurisprudence. Also the way in which cumulative acts/violations are deemed to amount to persecution still is heavily influenced by traditional restrictive thinking. Even for 'internal flight' and 'cessation on the grounds of changed circumstances', human rights incorporation remains incomplete.

Cathryn Costello contrasted the different structures and jurisdictions of the ECtHR and the Court of Justice of the EU (CJEU) as potentially informing their approaches to the use of

human rights law in prohibiting *refoulement* and interpreting refugee law respectively. On the concept of 'persecution', she examined the recent case-law relating to claims based on religious manifestation and sexuality and questioned whether complete convergence between the approaches was a benign influence. She drew particular attention to the narrowness of the ECtHR 'flagrant breach' approach to extraterritorial breaches of non-absolute rights and argued that it should not be imported as a yardstick for assessing 'persecution' in refugee claims. She also endorsed the CJEU rejection of the notion that identifying 'core' entitlements in relation to specified rights is useful in such contexts.

The ensuing discussion focused primarily on the different ways of articulating the relationship between refugee protection and human rights concepts of non-*refoulement*, such as the 'flagrant breach' test developed by the ECtHR. This led to questions concerning the topic of violence against women and whether human rights law concepts might help refugee law to develop a holistic approach to this issue or whether an autonomous interpretation is required. There was also consideration of the extent to which integration of human rights principles in refugee law created an overly complicated framework that might be difficult for decision-makers to apply in a consistent and coherent manner.

Panel III: Law and Practice in the Global South

The third and final panel on comparative perspectives – chaired by **Dallal Stevens** – shifted the focus of the presentations towards practice outside the countries of the global North.

Juan Carlos Murillo spoke first on the Inter-American human rights system and the ways in which it has been used for refugee protection in Latin America. He noted that this system expressly acknowledges the right to seek and be granted asylum as well as incorporating a broad set of protections against *refoulement* through the American Convention on Human Rights (ACHR). He argued that particular attention was required to the due process guarantees in the ACHR in order to promote effective exercise of the right to seek and be granted asylum. The scope of due process guarantees – as expressed in articles 8 and 25 ACHR – appears broad and consequential for refugee protection, especially in light of Inter-American Court of Human Rights (IACtHR) case-law interpreting these provisions.

Martin Jones contrasted the 'asylum' practice of three archetypal Asian States. Thus, Japan is a party to both refugee and human rights treaties yet rarely interprets refugee concepts by

reference to human rights law. Hong Kong is a party to human rights - but not refugee – treaties: categories of international protection are thus derived purely from international human rights standards such as the Convention against Torture. Malaysia is not a party to refugee or relevant human rights treaties and no 'international protection' is recognised other than that carried out by UNHCR. In consequence, he argued that there is no 'monolithic' Asian approach, although in general any reference to human rights in the context of asylum tended to be fairly superficial, including in respect of due process guarantees.

Juan Carlos Murillo then kindly delivered a short paper redacted by **UNHCR Division of International Protection** (whose representative was unable to make it on the day). This emphasised UNHCR's mandate to undertake refugee status determination in certain scenarios and explained the various ways in which human rights standards inform its interpretation of the refugee definition in this context. References to human rights law are also evident in UNHCR policy guidance on refugee law. Nonetheless, the paper acknowledged that further attention is needed, firstly, on the extent to which UNHCR's status determination procedures are - or should be - compliant with due process standards and, secondly, on UNHCR's better use of regional human rights norms and standards from beyond Europe to complement and reinforce refugee protection.

The paper scheduled to deal with practice in Africa was not delivered as a result of withdrawal by the presenter prior to the conference.

Participants in the following discussion drew attention to the potential 'ripple effect' of UNHCR policy among a range of other actors such that the form of its engagement with human rights law assumes particular importance. The relevance of human rights standards from regional systems outside Europe was again emphasised. The Asian case was felt to highlight the importance of terminology given that refugees were frequently being protected albeit in the absence of refugee law. In this sense, the rights protections of domestic constitutional law were important in relation to the broader concept of 'asylum'. In discussing transnational policy and judicial dialogue, it was asked whether an international refugee law court is now needed.

SECTION II – EMERGING THEMES AND CHALLENGES

Panel IV: The Relevance of Specific Bodies of Human Rights Law

The fourth panel – chaired by **Satvinder Juss** – adopted a thematic approach to look at the different ways in which those specialised bodies of human rights law have influenced understandings of the refugee concept.

Michelle Foster presented a state-of-the-art review of relationship between socio-economic rights and persecution in refugee law. She began by taking stock of the wide range of State legislation and case-law and UNHCR guidance that recognises that problems based in economic deprivation can amount to 'persecution'. She then addressed a number of misunderstandings in refugee law (and beyond) as to the nature of socio-economic rights in terms of rights hierarchies and also the nature of obligations associated with them. She concluded by examining some of the remaining challenges relating to the use of socio-economic rights to interpret the refugee concept and advocated for the adoption of a core/*de minimis* approach as a way of determining when the persecution threshold is reached.

Jason Pobjoy argued that the Convention on the Rights of the Child (CRC) has a critical role to play in assessing claims brought by refugee children. In particular, he set out three areas where the CRC might appropriately be engaged to assist in determining the status of a refugee child: (i) as a procedural guarantee (referring, in particular, to the right to be heard under Article 12); (ii) as an interpretative aid to inform the interpretation of the refugee definition (noting the positive practice in New Zealand, Canada and, albeit not always by explicit reference to CRC, the USA); (iii) as an independent source of protection. In this context, he stepped outside the international refugee protection regime and considered the extent to which the CRC contains additional complementary safeguards to children seeking international protection. He focused in particular on the enhanced use of Article 3 (the best interests principle) in decisions involving removal of a child from a host state.

Heaven Crawley reviewed the role of human rights law in 'gendering' international refugee protection. She drew attention to the significant extent to which feminist scholarship and asylum case-law has drawn explicitly on human rights law and catalysed the latter's use in broader terms. However, developments in human rights law – as in relation to domestic violence – have not yet been taken up by refugee law, reflecting wider problems in the ways in which issues of gender have been framed and incorporated by refugee law. Examples

include not only the gap between law and practice and the trend towards 'exclusionary inclusion' but also a misplaced emphasis on women as victims rather than on their status as rights-holders, and a failure to recognise the political and religious contexts in which violence against women occurs in favour of a 'default' particular social group analysis. She concluded by asking whether human rights law might have a further role to play in reconfiguring the relationship between gender and refugee law, noting that the application of human rights law has itself been gendered.

Andreas Dimopoulos turned the analytical gaze towards the fast-developing field of human rights law addressed to persons with disabilities – particularly the Convention on the Rights of Persons with Disabilities (CRPD) - and asked how it might impact on interpretation of the refugee concept. He drew particular attention to the CPRD conceptualisation of disability as a social construct; a function of a failure to accommodate the needs of people with impairments. Within an understanding of 'persecution' which encompasses economic and social rights, he argued that a disability-sensitive interpretation is required that focuses attention upon both non-discrimination and the measures required by a State to ensure that an impairment does not become a disability. He also suggested that the CRPD framework means that there is little difficulty in making out persons with disability as a 'particular social group' especially where negative attitudes exist towards them.

In the discussion that followed, participants raised a range of questions relating to the topics posed. For instance, on the question of child rights, these concerned the interplay between the 'best interest' principle and the idea of paramount interest, the special situation of unaccompanied children and the possible distinctions between civil and common law practice. A substantial range of comments and questions were also generated on the situation of women, particularly in relation to socio-economic deprivation.

Panel V: Contemporary Thematic Challenges for Refugee Law

The final panel – chaired by **Sebastiaan de Groot** – assessed a different set of thematic developments, namely certain challenging concepts in contemporary refugee law and the role of human rights law in their interpretation.

Evangelia (Lilian) Tsourdi analysed the relevance of human rights law to refugee claims based on religion, a topic of great contemporary significance. She contrasted not only the

differing scope of freedom of religion under the United Nations and European treaties but also the differing approaches of the ECtHR and CJEU to, respectively, expulsion and asylum cases involving religion. She argued that the interpretation of freedom of religion in human rights forums must inform refugee status proceedings but cautioned against automatic application from one sphere to the other, especially in relation to limitation of the right. She also identified the 'concrete consequences' approach of the CJEU as useful, albeit again with a caveat about equating 'persecution' exclusively with violations of non-derogable rights.

A joint presentation by **Jessica Schultz** and **Terje Einarsen** offered a broad thesis on how the internal protection alternative (IPA) is and should be interpreted by reference to refugee law. Their starting point was the proposal that the IPA concept should be understood as an implied limitation to the right to refugee status. Within this conception, they argued that there are a number of discrete ways in which international human rights law is relevant to assessing the existence of an IPA. These include defining the scope of 'persecution' or 'serious harm' in another part of the country that would rule it out as an IPA, as well as in constructing the standards of affirmative protection required to make an IPA a lawful limitation on the right to refugee status. They also explored possible gaps between the IPA practice of the ECtHR and the requirements according to refugee law.

David James Cantor assessed certain challenges posed by the development of a 'human rights paradigm' in refugee law. He argued that the novel scholarly model proposed by Hathaway contains two unresolved conceptual ambiguities, namely the textual basis on which recourse to human rights law is justified - i.e. the Refugee Convention preamble – as well as the meaning of 'surrogate' protection in this human rights model of refugee law. He then suggested that take-up of the scholarly model in practice is uneven on several counts. These include not only a reinforced tendency towards interpretative fragmentation rather than coherence at the global level but also, in some parts, the emergence of a troubling species of 'human rights law for the purpose of refugee law' that is alien to human rights law.

The ensuing discussion revolved around whether the more questionable tendencies in the actual use of human rights law in refugee law represent an acceptable compromise between different interpretative imperatives. There was also some debate of the merits of the scholarly model of using human rights law to interpret the refugee concept. Participants returned to take up discussion of the 'core' approach to assessing human rights violations in the context of freedom of religion.

FOLLOW-UP

An internet discussion is planned for early 2014 in which short pieces on a number of the themes canvassed during the conference will be posted on the Refugee Research Network website and opened for broader public discussion.

An edited volume of selected conference paper will be produced during 2014.

List of panel speakers and chairs

Professor Deborah Anker	Harvard Immigration and Refugee Clinical Programme
Dr Roland Bank	UNHCR Germany
Bruce Burson	New Zealand Immigration and Protection Tribunal
Professor Heaven Crawley	Centre for Migration Research, Swansea University
Dr David James Cantor	Refugee Law Initiative, SAS, University of London
Dr Cathryn Costello	Refugee Studies Centre, University of Oxford
Sebastiaan de Groot	International Association of Refugee Law Judges
Dr Andreas Dimopoulos	Brunel University
Lord Dyson MR	Court of Appeal of England and Wales
Professor Terje Einarsen	University of Bergen
Professor Dr Roger Errera	French Conseil d'Etat (formerly)
Dr Michelle Foster	Refugee Law Programme, University of Melbourne
Raza Husain QC	Barrister, Matrix Chambers
Dr Martin Jones	University of York
Professor Satvinder Juss	Kings College London
Linda Kirk	Australian Refugee Review Tribunal
Dr Violeta Moreno-Lax	Queen Mary, University of London
Juan Carlos Murillo	UNHCR Regional Legal Unit for Latin America
Professor Susan Kneebone	Monash University
Professor Steve Meili	University of Minnesota
Jason Pobjoy	University of Cambridge and Blackstone Chambers
Jessica Schultz	University of Bergen
Professor James Simeon	Centre for Refugee Studies, York University Toronto
Professor Dallal Stevens	University of Warwick
Evangelia (Lilian) Tsourdi	Université Libre de Bruxelles